BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	

COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.
ON PETITION FOR RECONSIDERATION

Arch Communications Group, Inc. ("Arch"), hereby submits these Comments supporting the Petition for Reconsideration filed by the Cellular Telecommunications Industry Association ("CTIA") insofar as it urges the Commission to revise the *Universal Service Order*[1] to permit Commercial Mobile Radio Service ("CMRS") providers to recover universal service contributions from all of their customers. In that regard, Arch also supports CTIA's request that the Commission preempt state contract law to the extent necessary to permit CMRS carriers to recover universal service contributions from all of their customers.

I. INTRODUCTION/SUMMARY

One of the most critical issues regarding universal service is the appropriate means for obtaining the funding necessary to support universal service programs. In this regard, Sections 254(b)(4) and 254(d) clearly provide that all providers of interstate telecommunications services must contribute to universal service support on an "equitable" and "non-discriminatory" basis.[2] In addition, the Commission established "'competitive neutrality' as an additional principle upon which [it] base[s] policies for the preservation and advancement of universal

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1 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *First Report and Order*, FCC 97-157 (rel. May 8, 1997 ("*Universal Service Order*")).

2 47 U.S.C. § 254(b)(4), 254(d).

service."[3] It is of critical importance to the paging industry that these statutory mandates and regulatory policies are given proper effect.

Compared with other segments of the telecommunications industry, paging carriers are extraordinarily sensitive to cost increases that may result from universal service contribution obligations.[4] Given industry characteristics, it will be necessary for paging companies to "pass through" universal service obligations to their subscribers. But paging companies do not have the unfettered ability to assess what amounts to a rate increase on customers without creating the potential for a down-turn in demand. This distinguishes the paging industry from other providers of telecommunications services, such as local exchange carriers, that provide an essential service to a captive customer base. Thus, Arch urges the Commission to ensure that any universal service funding mechanisms adopted do not have a disproportionate and improper impact upon the industry.

CTIA notes in its Petition that the *Universal Service Order* improperly restricts CMRS carriers from recovering universal service contributions from all their customers, intrastate and interstate.[5] Furthermore, CTIA urges the Commission to clarify that state contract law is preempted to the extent necessary to permit the pass-through of universal service contributions.[6]

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3 *Universal Service Order* at ¶ 46.

4 *Cf. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 7 Comm. Reg. (P&F) 1, 21 n.161 (rel. March 25, 1997).

5 CTIA Petition at 9-10.

6 *Id.* at 24.

Arch supports CTIA's Petition and submits that the *Universal Service Order* must be revised to ensure that the universal service funding obligations do not have a disproportionate and improper impact upon paging carriers. As discussed above, the ability to recover costs associated with universal service contributions on a rational and equitable basis is essential to the welfare of the paging industry.

II. THE COMMISSION SHOULD PERMIT CARRIERS TO RECOVER UNIVERSAL SERVICE CONTRIBUTIONS FROM ALL SERVICES

The *Universal Service Order* requires contributions to high cost universal service programs to be allocated based upon interstate and international revenues.[7] Contributions to education, libraries and health care universal service programs (the so-called "E-rate) are to be allocated based upon intrastate, interstate and international revenues.[8] Nevertheless, carriers are permitted to recover all universal service contributions (including E-rate contributions) only from rates on interstate and international services.[9] According to the Commission, this restriction promotes federal/state comity and will avoid "a blanket increase in charges for basic residential dialtone service."[10] CTIA opposes the cost recovery limitation and urges the Commission to "clarify that CMRS providers may apply pass-throughs to all of their services."[11] Arch supports CTIA in this regard.

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7 *See Universal Service Order* at ¶ 836.

8 *Id.* at ¶¶ 840-41.

9 *Id.* at ¶¶ 825, 838.

10 *Id.* at ¶¶ 826-27.

11 CTIA Petition at 9-10.

As CTIA notes, requiring CMRS providers to track "interstate" and "intrastate" end-users presents numerous and substantial technology and billing difficulties.[12] As a general matter, the origination and termination points of a call are considered when determining whether a given call is "intrastate" or "interstate."[13] As CTIA points out, however, identifying where a call originates is difficult in the CMRS environment. For example, a single antenna or a single switch is frequently used to serve areas in more than one state making it difficult to identify precisely where a call originated.[14] As CTIA makes apparent, the difficulties in tracking "interstate" and "intrastate" customers arise from the fact that CMRS services are inherently interstate services. It is for this reason that Congress amended Section 332 of the Act to preempt state regulation of CMRS entry and rates.[15] Thus, at least for jurisdictional and rate regulation purposes, *all* CMRS customers should fall within the purview of federal, not state, jurisdiction.

As noted above, moreover, the Commission's rationale for limiting universal service contribution to "interstate" customers was to avoid "a blanket increase in charges for *basic residential dialtone service*" and to serve federal/state comity.[16] Since paging does not constitute basic residential dialtone service,[17] allowing paging carriers to pass through universal service contributions to all customers will have no impact on rates for basic service. For the

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12 *Id.* at 10, 12-18.

13 *Id.* at 15-16.

14 *Id.* at 14-16.

15 *Iowa Utilities Bd. et al. v. FCC*, No. 96-3321, slip op. n.21 (8th Cir. July 18, 1997).

16 *Universal Service Order* at ¶¶ 827, 838 (emphasis supplied).

17 While two-way wireless services may one day serve as a substitute for basic residential service, one-way messaging services will never substitute for such service.

same reason, federal/state comity is also not an issue in the paging context since an increase in paging rates, as opposed to basic telephone rates, is a matter over which the states have no jurisdiction. Thus, insofar as federal/state comity and concern regarding rates for basic service are not relevant in the paging context, the Commission has provided no justification for precluding paging companies from passing through universal service obligations to "intrastate" service customers.

In addition, the Commission's intrastate/interstate customer distinction for purposes of universal service contribution pass-through will also create substantial inequities among paging customers. Unlike contributions for the high-cost fund, E-rate contributions are allocated to a carrier based on intrastate *and* interstate revenues.[18] In effect, a carrier's "intra-state" customers increase a paging carrier's universal service costs, but are not available to help defray those costs. "Interstate" customers are left to shoulder the cost burden created by "intrastate" customers. Such a result is inequitable and disserves the public interest.

The Commission's intrastate/interstate customer distinction will also create inequities and competitive distortions between paging-only companies and other CMRS carriers that provide paging among their complement of services. Traditionally, the majority of paging licenses have been issued on a transmitter-by-transmitter basis and a significant percentage of paging traffic is arguably local and intrastate. Personal Communications Services ("PCS"), by contrast, are licensed based on Major Trading Areas which usually cover more than one state.[19] Similarly, many cellular carriers are conjoining their license areas effectively creating areas which cover more than one state. Thus, unlike paging carriers, most PCS customers and a

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[18] *See* 47 C.F.R. § 54.703; *Universal Service Order* ¶ 829.

[19] *See* CTIA Petition at 13-14; 47 C.F.R. § 24.202.

substantial portion of cellular customers can reasonably be characterized as "interstate" customers.

Arch therefore believes that cellular and PCS services will be able to spread their universal service contribution costs over a broader base of customers, thereby reducing the amount of the pass-through to each customer. This result is particularly troubling because, paging carriers are facing greater and greater competition from two-way carriers in the provision of messaging services.[20] Restricting a paging-only carrier to recovering universal service contributions only from a limited "interstate" customer base, while permitting other CMRS providers to recover such costs from potentially a much broader base of customers, will place paging carriers at a substantial competitive disadvantage in the provision of messaging services.

Arch therefore urges the Commission to clarify that paging providers may pass-through their universal service contributions to all of their customers, regardless of whether they are characterized as "interstate" or "intrastate." As noted, the reasons expounded by the Commission for disallowing pass-through to "intrastate" customers simply do not apply in the paging context.

III. THE COMMISSION SHOULD EXPRESSLY PREEMPT STATE LAW TO ACCOMMODATE CONTRACT ADJUSTMENT

The Commission recognized in the *Universal Service Order* that "[b]y assessing a new contribution requirement, we create an expense or cost of doing business that was not anticipated at the time contracts were signed."[21] Accordingly, it is in the public interest to allow

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[20] Many two-way carriers are beginning to bundle local, long distance, and other services with wireless voice and messaging services. *See* Personal Communications Industry Association Petition for Reconsideration and Clarification 6; 7 Comm. Reg. at 30-31.

[21] *Universal Service Order* ¶ 851.

telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business.[22]

Oddly, however, the Commission added that "this finding is not intended to preempt state contract laws."[23] CTIA notes that this language leaves in some doubt the question of whether carriers can pass-through a reasonable share of their universal service contributions to their customers.[24] CTIA therefore asks the Commission to clarify that "it does not mean to preempt state contract law, *except to permit universal service contributors to pass through a reasonable share of their contribution obligations.*"[25] Arch supports CTIA on this point.

As discussed above, the ability to pass through universal service contributions is critical to ensure that the Commission's universal service rules and mechanisms satisfy the "equitable" and "non-discriminatory" standards of Section 254 of the Communications Act.[26] Further, the Court of Appeals for the Eighth Circuit has recently recognized that state regulation of CMRS entry and rates is preempted by the Communications Act and the Commission has authority to issue rules of special concern to CMRS carriers.[27] Thus, the ability to authorize contract adjustment to account for the impact of universal service goes directly to the core of the Commission's authority under the Communications Act to regulate CMRS rates, as well as the universal service obligations of CMRS carriers.

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22 *Id.*

23 *Id.*

24 CTIA Petition at 24.

25 *Id.* (emphasis in original).

26 *See* text at 1 *supra.*

27 *Iowa Utilities Bd. et al. v. FCC*, No. 96-3321, slip op. n.21 (8th Cir. July 18, 1997).

There is substantial authority demonstrating that, unless expressly prohibited by statute, the Commission may reform private contracts where necessary to carry out its functions under the Communications Act or where such action otherwise serves the public interest.[28] In *Connolly v. PBGC*, the United States Supreme Court held that:

> Contracts, however express, cannot fetter the constitutional authority of Congress. *Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.*
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[29]

The Court has applied this principle to allow the Commission to reform contracts where necessary to implement or enforce the provisions of the Act and promote the public interest.[30] Arch submits therefore that the Commission has the authority to reform preexisting contracts as necessary to implement the requirements of the 1996 Act such as Section 254.

The Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee") and the American Petroleum Industry ("API") disagree with this proposition, contending that the

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28 *See* n.44 *supra.*

29 *Connolly v. PBGC*, 475 U.S. 211, 223-224 (1986) (emphasis added).

30 *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 n.31 (1972).

Mobile-Sierra[31] and "substantial cause"[32] doctrines prohibit the Commission from reforming private contracts to add a universal service assessment.[33] The Ad Hoc Committee and API are wrong — both doctrines are inapposite in the case of contracts dealing with CMRS rates and therefore do not limit the Commission's ability to reform contracts as necessary to permit universal service pass-through.

The *Mobile-Sierra* and "substantial cause" doctrines were established to prevent carriers from abrogating unilaterally private contracts by filing a new tariff and relying on the filed-rate doctrine to assert that the tariff supersedes the pre-existing contract.[34] CMRS in general, and paging in particular, are detariffed highly competitive industries.[35] Consequently, the filed-rate doctrine is not applicable in the CMRS context and thus the policies served by the *Mobile-Sierra* and substantial cause doctrines are irrelevant to whether the Commission may reform private contracts as necessary to permit the pass-through of universal service contributions.

In light of the above, Arch submits that the Commission can and should expressly preempt state law for the limited purpose of allowing CMRS providers to pass through

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31 *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

32 Ad Hoc Committee Petition at 8-9; API Petition at 4-5, n.3.

33 Ad Hoc Committee Petition for Reconsideration 4-9; API Petition for Reconsideration 4-7.

34 *See Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1275-82 (3d Cir. 1974), *AT&T Reclassification Order*, 11 FCC Rcd. 3271, 3338, 3341-43 (1995) (discussing *Sierra-Mobile* doctrine and "substantial cause" test in context of filed-rate doctrine).

35 *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411 (1994).

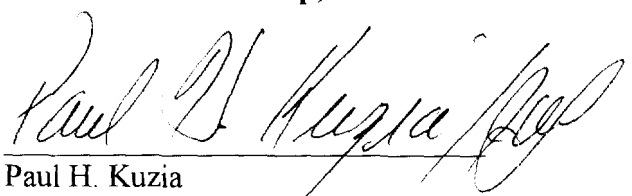
a share of their contribution obligations to contract customers. Contract adjustments are particularly justified in light of the federally-imposed cost recovery limitations imposed on telecommunications carriers discussed above. Contract adjustment and, at a minimum, allowing cost recovery of universal service contributions from both intrastate and interstate customers is critical to enabling paging carriers to adjust to the universal service regulatory regime.

IV. CONCLUSION

For the foregoing reasons, Arch urges the Commission to clarify that paging providers may pass through universal service contributions to all of their services, "intrastate" as well as "interstate." The Commission should also expressly preempt state law for the limited purpose of allowing paging providers to pass through a share of their contribution obligations to contract customers.

Respectfully submitted,

Arch Communications Group, Inc.

By: 

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August 18, 1997

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